



**[6450-01-P]**

**DEPARTMENT OF ENERGY**

**10 CFR Part 430**

**[Docket Number EERE-BT-PET-0053]**

**Energy Conservation Program for Consumer Products: Association of Home Appliance Manufacturers Petition for Reconsideration**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Petition for Reconsideration; Request for Comments.

**SUMMARY:** The Department of Energy (DOE) received a petition from the Association of Home Appliance Manufacturers (AHAM) requesting reconsideration of the U.S. Department of Energy's (DOE) final rule to amend the test procedures for residential dishwashers, dehumidifiers, and conventional cooking products, published on October 31, 2012, and DOE's direct final rule to amend energy conservation standards for dishwashers, published on May 30, 2012. Specifically, AHAM requested that DOE stay the effectiveness of the test procedure final rule and final standards rule until DOE either: revises the standards in the final standards rule to account for the impact on measured energy resulting from test procedure amendments to measure fan-only mode and standby and off mode energy use; or delays requirements regarding measurement of fan-only mode and standby and off mode energy use until promulgation of a

revised standard for dishwashers. DOE seeks comment on whether to grant the petition and proceed with a rulemaking on this matter.

**DATES:** Any comments must be received by DOE not later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments must be submitted, identified by docket number EERE–BT–PET–0053, by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

2. *E-mail:* [AHAMPetition2012PET0053@ee.doe.gov](mailto:AHAMPetition2012PET0053@ee.doe.gov). Include either the docket number EERE–BT–PET–0053, and/or “AHAM Petition” in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585–

0121. Please submit one signed original paper copy.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585– 0121.

5. *Instructions:* All submissions received must include the agency name and docket number for this proceeding.

*Docket:* For access to the docket to read background documents, or comments received, go to the *Federal eRulemaking Portal* at <http://www.regulations.gov>. In addition, electronic copies of the Petition are available online at DOE’s Web site at the following URL address:

<http://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-PET-0053>.

**FOR FURTHER INFORMATION CONTACT:**

Steven Witkowski, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE-2J, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-7892, or e-mail: [Steven.Witkowski@ee.doe.gov](mailto:Steven.Witkowski@ee.doe.gov).

Elizabeth Kohl, U.S. Department of Energy, Office of General Counsel, GC-71, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-7796, e-mail: [Elizabeth.Kohl@hq.doe.gov](mailto:Elizabeth.Kohl@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., provides among other things that, “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” (5 U.S.C. 553(e)) The Association of Home Appliance Manufacturers (AHAM) petitioned DOE for reconsideration of its final test procedure rule to amend the test procedures for dishwashers, dehumidifiers and conventional cooking products (77 FR 65942 (Oct. 31, 2012) and its direct final rule to amend the energy conservation standards applicable to dishwashers (77 FR 31918 (May 30, 2012)). Specifically, AHAM requested that DOE stay the effectiveness of the test procedure final rule and final standards rule until DOE either: 1) revises the standards in the final standards rule to account for the impact on measured energy resulting from test procedure amendments to measure fan-only mode and standby and off mode energy use; or 2) delays requirements regarding measurement of fan-only mode and standby and off mode energy use until promulgation of a revised standard for dishwashers. In promulgating this petition for public comment, DOE seeks views on whether to grant the petition and undertake a rulemaking to

consider the proposals contained in the petition. By seeking such comment, DOE takes no position at this time on the merits of the suggested rulemaking.

Issued in Washington, D.C. on [December 21, 2012](#).

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Gregory H. Woods  
Office of General Counsel  
U.S. Department of Energy

Set forth below is the full text of the AHAM petition.

**Before the**  
**UNITED STATES DEPARTMENT OF ENERGY**  
**Office of Energy Efficiency and Renewable Energy**

In the Matter of	)	
	)	
Energy Conservation Program:	)	Docket No. EERE-2010-BT-TP-0039
Test Procedures for Residential	)	
Dishwashers, Dehumidifiers, and	)	RIN: 1904-AC01
Conventional Cooking Products	)	
	)	
and	)	
	)	
Energy Conservation Program:	)	Docket No. EERE-2011-BT-STD-
0060	)	
Energy Conservation Standards	)	
For Residential Dishwashers	)	RIN No. 1904-AC64
	)	
	)	
	)	10 C.F.R. Parts 429 and 430
	)	

**PETITION FOR RECONSIDERATION**

The Association of Home Appliance Manufacturers (AHAM) respectfully petitions the Department of Energy (DOE) for reconsideration of its final rule on Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products, Docket No. EERE-2010-BT-TP-0039, RIN 1904-AC01, 77 Fed. Reg. 65942 (Oct. 31, 2012) (Test Procedure Final Rule) and its direct final rule on Energy Conservation Standards for Dishwashers, Docket No. EERE-2011-BT-STD-0060, RIN No. 1904-AC64, 77 Fed. Reg. 31918 (May 30, 2012) (Direct Final Rule).

AHAM believes that, overall, the amendments made to the residential dishwasher test procedure are critical amendments, many of which will enhance the repeatability and reproducibility of the test procedure. AHAM requested many of the amendments, and we thank DOE for acting quickly to address the issues we raised. But, despite DOE's conclusions that amendments to the

residential dishwasher test procedure regarding fan-only mode and standby and off mode would impact measured energy and AHAM's comments to the same effect, DOE has ignored and violated its statutory obligations under 42 U.S.C. § 6293(e) and 42 U.S.C. § 6295(gg)(2). These provisions require analysis of test procedure revisions to determine whether they affect the stringency of the underlying standard, and, if so, DOE must adjust the standards accordingly. This is to prevent "back-door" rulemakings that effectively decrease or increase the appliance standards. DOE's action is incompatible with and undermines the consensus agreement which underlies the amended residential dishwasher standard.

AHAM thus requests an immediate stay of the effectiveness of both the Direct Final Rule and the Test Procedure Final Rule until DOE either 1) revises the standards in the Direct Final Rule to account for the impact on measured energy resulting from test procedure amendments regarding fan-only mode and standby and off mode energy; or 2) delays requirements regarding measurement of fan-only mode and the revised standby and off mode procedures until such time as a revised standard is promulgated for residential dishwashers.

### **FACTS**

On July 30, 2010, AHAM and energy efficiency advocates submitted energy conservation standards proposals for residential dishwashers and other products that had been the subject of intensive negotiations (Joint Stakeholder Agreement). DOE encouraged these negotiations, supplied technical support to the parties, and considered the standards under the fast track consensus standards provision in 42 U.S.C. § 6295(p)(4). That agreement included agreed-to energy conservation standards levels and a compliance date for dishwashers which the parties to the agreement jointly submitted to DOE via petition dated September 25, 2010. Notably, the Joint Stakeholder Agreement expressly states that "[t]he Joint Stakeholders have made no agreement concerning the appropriate levels for standby or off mode energy consumption and agree that stakeholders will comment to DOE as they view appropriate during DOE's rulemaking process for

each of the affected products, as applicable.” Joint Stakeholder Agreement, at ¶ 4. And the Joint Stakeholders “agree[d] that pending amendments to test procedures for the affected products should be completed by DOE, subject to input from all stakeholders and agree[d] to recommend that DOE translate the standards contained in this agreement to equivalent levels specified under revised test procedures.” *Id.* at ¶ 5. In addition, the Joint Stakeholder Agreement provides, in proposed statutory language, that, if the residential dishwasher test procedure is amended prior to the compliance date of the proposed standards (2013), the standards should be amended consistent with 42 U.S.C. § 6293(e)(2). *See* Joint Stakeholder Agreement, at 7. On May 30, 2012, DOE published the Direct Final Rule and, as required by the Energy Policy and Conservation Act of 1975 (EPCA), as amended by the Energy Information and Security Act of 2007 (EISA), a Notice of Proposed Rulemaking. 77 Fed. Reg. 31964 (May 30, 2012). The Direct Final Rule promulgated standards levels consistent with those the Joint Stakeholder Agreement and September 25, 2010 petition proposed. Compliance with those standards is mandatory on May 30, 2013.

In a separate rulemaking, on December 2, 2010, DOE published a notice of proposed rulemaking in which it proposed amendments to the residential dishwasher test procedure, Appendix C to Subpart B of Part 430 (Appendix C), to address standby and off mode, including incorporation by reference of IEC Standard 62301, First Edition. *See* Energy Conservation Program for Consumer Products: Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products (Standby Mode and Off Mode), Notice of Proposed Rulemaking and Announcement of Public Meeting, 75 Fed. Reg. 75290 (Dec. 2, 2010) [hereinafter December 2010 NOPR]. DOE also held a public meeting on December 17, 2010. Appendix C already included measurement of standby mode, but the proposed amendments proposed some changes to the energy that would be measured. For example, DOE proposed to define an “inactive mode” as “a standby mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display.” December 2010 NOPR, at 75298. DOE stated that

proposed amendments would not apply to, and would have no impact on, existing standards. *See* December 2010 SNOPR, at 75316. DOE did not propose amendments to the dishwasher active mode test procedure. DOE next issued a supplemental notice of proposed rulemaking on September 20, 2011, in which it proposed to incorporate by reference IEC Standard 62301, Second Edition. *See* Energy Conservation Program: Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products (Standby Mode and Off Mode), Supplemental Notice of Proposed Rulemaking, 76 Fed. Reg. 58346 (Sept. 20, 2011) [hereinafter September 2011 SNOPR]. DOE did not propose amendments to the dishwasher active mode test procedure. DOE did not expand upon or revise its December 2010 NOPR discussion about compliance dates. In response to the September 2011 SNOPR, AHAM commented that “[a]lthough the dishwasher test procedure currently measures standby, the proposed amendments change what energy will be measured. For example, the end of cycle energy will now be measured, including cycle finished mode.” AHAM Comments on the SNOPR for Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products 3 (Oct. 20, 2011) [hereinafter AHAM October 2011 Comments]. In response to comments from AHAM and its members, DOE published a second supplemental notice of proposed rulemaking. *See* Energy Conservation Program: Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products (Standby Mode and Off Mode), Supplemental Notice of Proposed Rulemaking, 77 Fed. Reg. 31444 (May 25, 2012) [hereinafter May 2012 SNOPR]. In the May 2012 SNOPR, DOE proposed to amend the residential dishwasher test procedure to, among other things, include measures of energy consumption in fan-only mode. This was the first time DOE proposed amendments to the active mode test procedure and the first time DOE proposed a procedure to measure fan-only mode.

In its comments on the May 2012 SNOPR, AHAM commented that it was “somewhat unclear when compliance with the proposed revisions to the dishwasher test procedure would be required. Some of the proposals would impact measured energy (e.g., fan-only mode, water softener



regeneration). Accordingly, if those amendments would be effective under the existing standards and/or the pending direct final rule, DOE would need to do a crosswalk to ensure that the stringency of those standards does not change. . . . Alternatively, DOE would need to address the changes in measured energy in a future standards rulemaking.” AHAM Comments on the SNOPR for Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products 2 (June 25, 2012) [hereinafter AHAM June 2012 Comments] (emphasis in original). AHAM also proposed that DOE incorporate by reference ANSI/AHAM DW-1-2009 in Appendix C. *See* AHAM June 2012 Comments, at 12-13.

In response to comments it received from AHAM and others on the May 2012 SNOPR, DOE published a third supplemental notice of proposed rulemaking on August 15, 2012. *See* Energy Conservation Program: Test Procedures for Residential Dishwashers and Cooking Products, Supplemental Notice of Proposed Rulemaking, 77 Fed. Reg. 49064 (Aug. 15, 2012) [hereinafter August 2012 SNOPR]. In the August 2012 SNOPR, DOE proposed to, among other things, revise the test procedure proposed in the May 2012 SNOPR for measuring energy use in fan-only mode and update the referenced industry test method to ANSI/AHAM DW-1-2010 (AHAM DW-1-2010).

Except with regard to replacements proposed for obsolete dishware, flatware, and food items, DOE did not clarify or propose specific compliance dates in the August 2012 SNOPR preamble, including responding to AHAM’s previous comment requesting clarification about compliance dates. DOE did, however, include language in the proposed regulatory text addressing the compliance date for fan-only mode and water softener energy consumption: “The procedures and calculations that refer to the combined low-power mode, fan-only mode, and water softener energy consumption . . . need not be performed to determine compliance with energy conservation standards for dishwashers at this time.” August 2012 SNOPR, at 49072.

In response to the August 2012 SNOPR, AHAM commented “that it is still somewhat unclear when compliance with some of the proposed revisions to the dishwasher test procedure

would be required” and requested “that DOE clarify which amendments are to be effective at which time.” AHAM Comments on the SNOPR for Test Procedures for Residential Dishwashers, Dehumidifiers, and Conventional Cooking Products 2 (Aug. 30, 2012) [hereinafter AHAM August 2012 Comments]. In addition, AHAM commented that, because some of the proposals would or could impact measured energy, DOE would need to ensure that the stringency of the standards does not change if it intended to require the amendments be used for compliance with existing or 2013 standards. *See id.* On October 31, 2012, DOE published the Test Procedure Final Rule in which it established a new test procedure for residential dishwashers, Appendix C1 to Subpart B of Part 430 (Appendix C1). Relevant to the instant petition, the Test Procedure Final Rule:

- Added provisions for measuring standby mode and off mode energy consumption, including incorporating specific sections of IEC Standard 62301, Second Edition by reference;
- Added a provision for measuring energy use in fan-only mode; and
- Updated the referenced industry test method to ANSI/AHAM DW-1-2010;

DOE determined that “the date upon which the use of new appendix C1 will be required will be May 30, 2013, the compliance date of the direct final rule published on May 30, 2012 . . .” Test Procedure Final Rule, at 65947.

DOE did not revise the standards promulgated in the Direct Final Rule to account for changes in measured energy as a result of amendments requiring measurement of fan-only mode. DOE reasoned that “energy use in [fan-only mode] is estimated to be less than 5 percent of the total energy use of standard dishwashers. Given that 65 percent of all standard dishwashers currently on the market meet or exceed the minimum energy conservation standards established in the direct final rule, inclusion of this small amount of energy use would not impact compliance with the revised standard. Therefore, DOE has determined that the energy use in fan-only mode is *de minimus* and insufficient to alter in a material manner the measured energy use of dishwashers.” Test Procedure Final Rule, at 65947 (emphasis in original).

Nor did DOE adjust the standards in the Direct Final Rule to account for the standby and off-mode test procedure amendments. *See id.* at 65961. DOE relied on its conclusion that “the proposed amendments to the dishwasher test procedure regarding standby mode and off mode would not alter the measured efficiency of any covered product under the existing test procedure.” *Id.* And, DOE concluded, because it was not presented with data showing otherwise, that the incorporation by reference of AHAM DW-1-2010 in the dishwasher test procedure would not impact measured energy. *See id.* at 65966.

## ARGUMENT

When DOE amends a test procedure, it must determine “to what extent, if any, the proposed test procedure would alter the measured energy efficiency, measured energy use, or measured water use of any covered product as determined under the existing test procedure.” 42 U.S.C. § 6293(e)(1). And, if DOE determines that the amended test procedure will alter measured energy or water use, DOE “shall amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure.” 42 U.S.C. § 6293(e)(2). There is a specific procedure, involving evaluating minimally compliant products, set forth in the law for making that adjustment. *See id.* Furthermore, DOE was required to prescribe in a final rule, no later than March 31, 2011, test procedure amendments with regard to standby and off mode for residential dishwashers. 42 U.S.C. § 6295(gg)(2)(B). Those test procedure amendments “shall not to be used to determine compliance with product standards established prior to the adoption of the amended test procedures.” 42 U.S.C. § 6295(gg)(2)(C). DOE did not satisfy its statutory obligations with regard to the fan-only mode, standby and off-mode, and updated industry test procedure amendments.<sup>1</sup>

<sup>1</sup> AHAM notes that it commented that the proposed amendments to measure water softener regeneration would also impact measured energy. *See* AHAM June 2012 Comments, at 2. Our understanding is that DOE determined that there would not be a change in measured energy as a result of the test procedure amendments to measure water softener regeneration because that energy is currently required to be

included for compliance with the standards under existing waivers. *See* Final Test Procedure Rule, at 65946-97 (“In the test procedure waivers granted for water softening dishwashers, DOE has required that such models meet the current energy conservation standards with the additional energy and water use associated with water softener regeneration included in the annual energy use and per-cycle water consumption metrics. . . . In accordance with the approach specified in these waivers, DOE determines that the energy and water use must be included in the metrics used to demonstrate compliance with any amended dishwasher energy conservation standards, including those in the direct final rule.”).

### **Amendments Regarding Fan-Only Mode On Measured Energy And Ensure That The Stringency Of The Standard Does Not Change.**

DOE determined, and, as discussed below, AHAM data confirms, that the fan-only mode amendments to the residential dishwasher test procedure impact measured energy. DOE stated that the impact would be “*de minimus*,” but gives no justification, quantification, standard, or criteria for that determination. It is a textbook arbitrary and capricious determination. As discussed more fully below, AHAM disagrees with the *de minimus* determination and believes that such a determination violates DOE’s statutory obligations under 42 U.S.C. § 6293(e). DOE should have accounted for the impact of the fan-only mode changes to the test procedure in the May 2013 standard or should not have required measurement of fan-only mode for compliance with those standards. AHAM thus requests that DOE adjust the May 2013 standards to account for the impact of the fan-only mode amendments on measured energy or not require measurement of fan-only mode until a later standard is promulgated that does account for that increase in measured energy.

#### **A. DOE Concluded That The Fan-Only Mode Amendments Impact Measured Energy.**

In the May 2012 SNOPR, when DOE first proposed amendments to the residential test

procedure to measure fan-only mode, DOE found that the proposed measurement would increase measured energy. DOE calculated the range of annual energy consumption associated with an air circulation fan operating after the end of the active cycle, according to the proposed test procedure, to be from 0.4 to 17 kilowatt hours (kWh) per year. *See* May 2012 SNOPR, at 31448. DOE stated that the “higher end of the range is greater than 5 percent of the maximum allowable annual energy consumption for a standard dishwasher (355 kWh).” *Id.* DOE also stated that “the energy use associated with this mode may in some cases represent a larger percentage of annual energy consumption than the energy use in the low-power modes” and that, accordingly, “[t]his energy consumption would be required to be included in the annual energy consumption metric upon the compliance date of any updated dishwasher energy conservation standards addressing standby and off mode energy use.” *Id.* at 31451.

AHAM, though it did not oppose measurement of fan-only mode, agreed that it would increase measured energy, and, thus, requested clarification as to when the measurement would be required for compliance with the energy conservation standards for dishwashers:

DOE should also clarify when this measurement would be required for compliance with energy conservation standards for dishwashers. DOE stated that this would be “required in the annual energy metric upon the compliance date of any updated dishwasher energy conservation standards addressing standby mode and off mode energy use.” Especially because this measurement would impact measured energy, AHAM assumes that statement is referencing a future standard that has not yet been proposed and that the fan-only measurement would not be required for compliance with the standards in the current direct final rule for dishwashers, 77 Fed. Reg. 31918 (May 30, 2012). An express statement to that effect would provide clarity to regulated parties.

AHAM June 2012 Comments, at 3. Importantly, AHAM specifically stated its assumption that DOE’s statement regarding the compliance date did not refer to the then-pending standards in the

Direct Final Rule. *See id.*; *see also id.* at 2 (“AHAM notes that it is somewhat unclear when compliance with the proposed revisions to the dishwasher test procedure would be required. Some of the proposals would impact measured energy (e.g., fan-only mode, water softener regeneration). Accordingly, if those amendments would be effective under the existing standards and/or the pending direct final rule, DOE would need to do a crosswalk to ensure that the stringency of those standards does not change. . . . Alternatively, DOE would need to address the changes in measured energy in a future standards rulemaking. AHAM requests that DOE clarify which amendments are to be effective at which time.”) (emphasis in original).

In the subsequent August 2012 SNOPR, in response to AHAM’s comments, DOE proposed an alternative approach for measurement of fan-only mode, but DOE did not alter its analysis regarding the impact of the amendments on measured energy or respond to AHAM’s request for clarity regarding the compliance date for the proposed fan-only mode amendments. Thus, AHAM again requested clarity and argued that, because the proposed amendments to measure fan-only mode would impact measured energy, DOE would need to either amend the standards in the Direct Final Rule to ensure that the stringency of those standards did not change or not require measurement of fan-only mode for compliance with the current or May 2013 standards:

AHAM notes that it is still somewhat unclear when compliance with some of the proposed revisions to the dishwasher test procedure would be required. Some of the proposals would or could impact measured energy. Accordingly, if those amendments would be effective under the existing standards and/or the pending direct final rule, DOE would need to do a crosswalk to ensure that the stringency of those standards does not change.<sup>1</sup> Alternatively, DOE would need to address the changes in measured energy in a future standards rulemaking. AHAM requests that DOE clarify which amendments are to be effective at which time. <sup>1</sup> 77 Fed. Reg. 31918 (May 30, 2012).

Then, in the Test Procedure Final Rule, DOE adopted amendments to measure fan-only mode and confirmed its estimates of the upper end of the range of annual energy consumption associated with fan-only mode. *See* Test Procedure Final Rule, at 65959. Yet, despite the fact that it concluded that the amendments would impact measured energy, DOE determined that the amendments would be required for compliance with the May 2013 standards: DOE has determined that use of the test procedures to measure the energy use in fan-only mode on the compliance date of any amended standards is appropriate. . . . The energy use in these modes is estimated to be less than 5 percent of the total energy use of standard dishwashers. Given that 65 percent of all standard dishwashers currently on the market meet or exceed the minimum energy conservation standards established in the direct final rule, inclusion of this small amount of energy use would not impact compliance with the revised standard. . . . Therefore, DOE has determined that the energy use in fan-only mode is *de minimus* and insufficient to alter in a material manner the measured energy use of dishwashers. Therefore, DOE is not considering amending the standards set forth in the direct final rule.”

Test Procedure Final Rule, at 65947 (emphasis in original).

#### B. AHAM Data Show That The Fan-Only Mode Amendments Impact Measured Energy.

Based on data AHAM collected, the fan-only mode amendments to the residential dishwasher test procedure will add a shipment weighted average of 0.29 kWh per year in measured energy. That energy takes into account the market penetration of fan-only mode—it does not assume that all basic models have fan-only mode. In addition, the shipment weighted average number includes a wide range of impacts on manufacturers and individual models, some much greater than 0.29 kWh per year. AHAM thus encourages DOE to interview individual manufacturers about the impact based on different technologies. AHAM’s data show that, the fan-only mode amendments could add up to two percent of the 2013 standard in measured energy for some models. For models with fan-only mode, this is a significant impact on measured energy, particularly for minimally

compliant products, and could not only require manufacturers to re-certify some or all of their models, but could also impact compliance with the standards. DOE should adjust the May 2013 standard to account for this impact on measured energy or, alternatively delay the requirement to measure fan-only mode until the compliance date of a future standard (i.e., after the May 2013 standards). AHAM's preference would be that DOE revise the standards with which compliance is required on May 30, 2013, to account for the impact on measured energy.

#### C. DOE Must Account For The Impact Of The Fan-Only Mode Amendments On Measured Energy.

In making its determination not to adjust the May 2013 standards to account for the impact on measured energy resulting from the fan-only mode amendments, DOE seems to have relied upon 1) its estimation that energy use in fan-only mode is less than five percent of the total energy use of standard dishwashers; and 2) the fact that 65% of dishwashers currently on the market meet or exceed the energy conservation standards in the Direct Final Rule. *See Test Procedure Final Rule*, at 65947. But neither of these reasons is sufficient for not ensuring that the stringency of the May 2013 standards remains unchanged.

DOE determined that its amendments to require measurement of fan-only mode would impact measured energy. It must, therefore, amend the May 2013 standard to ensure that the stringency of those standards does not change. *See* 42 U.S.C. § 6293(e). As noted, DOE cannot simply ignore its statutory obligations because it does not deem the impact of the test procedure amendments to be significant. DOE stated that it considers the energy use in fan-only mode to be “*de minimus* and insufficient to alter in a material manner the energy use of dishwashers.” *Test Procedure Final Rule*, at 65947. But DOE has not defined, justified, or quantified what it considers to be *de minimus* for these purposes. Nor did Congress provide a *de minimus* exception to the requirements in 42 U.S.C. § 6293. DOE's determination that the energy use in fan-only mode is “*de minimus*” is a textbook arbitrary and capricious determination.

Furthermore, DOE's statement that 65% of dishwashers currently on the market meet or



exceed the May 2013 standards misses the point. First, even if it is true that most dishwashers already meet or exceed the upcoming standards, because fan-only mode impacts measured energy, manufacturers may need to re-certify and re-label models with fan-only mode, depending on the magnitude of the impact on each model and whether the manufacturer conservatively rated the product originally. The resources required to re-certify and re-label models is significant. And the result will be confusion to consumers. Second, DOE's own analysis itself is contradictory and belies its conclusions. That most products, but hardly all, already meet the new standards levels, leads to the conclusion that some do not (i.e., 35%) and, further, that minimally compliant products might well be affected by a five percent change (if that is the right number) in the stringency of the standard.

Nor is the fact that DOE is requiring measurement of fan-only mode for compliance with future standards sufficient to relieve DOE of its obligation to ensure that the stringency of those standards does not change. The standards in the Direct Final Rule did not contemplate measurement of fan-only mode, as evidenced by the facts that 1) the Joint Stakeholder Agreement on which the standards in the Direct Final Rule were based was finalized on July 30, 2010, over two years before the fan-only mode amendments were adopted; 2) the Direct Final Rule was published on May 30, 2012, only five days after DOE first proposed to require measurement of fan-only mode, and specifically stated that it was consistent with the proposed standards levels in the Joint Stakeholder Agreement; and 3) the Direct Final Rule became effective on September 27, 2012, a little over one month before publication of the Final Test Procedure Rule in the Federal Register.

The Joint Stakeholder Agreement specifically contemplated just this situation by providing, in proposed statutory language, that, should the residential test procedure be amended prior to the compliance date of the agreed-to amended standards, the procedures of 42 U.S.C. § 6293(e)(2) must be followed. *See* Joint Stakeholder Agreement, at 7. And the Joint Stakeholders "agree[d] that pending amendments to test procedures for the affected products should be completed by DOE,

subject to input from all stakeholders and agree[d] to recommend that DOE translate the standards contained in this agreement to equivalent levels specified under revised test procedures.” *Id.* at ¶ 5. But, because stakeholders did not know what action DOE would take with regard to fan-only mode, stakeholders could not have effectively or meaningfully commented to oppose application of the fan-only mode amendments for compliance with the May 2013 standards in comments on the Direct Final Rule.

DOE authorized the Test Procedure Final Rule on September 17, 2012, which was the same date comments on the Direct Final Rule and accompanying Notice of Proposed Rulemaking were due to DOE. Notice of that authorization was not sent to stakeholders until 6:06 p.m. on September 17, 2012, thus not affording stakeholders sufficient time to be able to review and develop comments prior to the end of the comment period on the Direct Final Rule.

Accordingly, AHAM requests that DOE either: 1) revise the May 2013 standards to account for the impact on measured energy resulting from the fan-only mode amendments; or 2) not require measurement of fan-only mode until such time as a future revised standard is promulgated for residential dishwashers. AHAM’s preference would be that DOE revise the standards with which compliance is required on May 30, 2013, to account for the impact on measured energy.

## **II. DOE Must Account For The Impact Of Test Procedure**

### **Amendments Regarding Standby And Off Mode On Measured Energy.**

DOE determined, and AHAM data confirms, that the standby and off mode amendments to the residential dishwasher test procedure impact measured energy. DOE determined that because the amendments would not be required to determine compliance with the current standards, it did not need to adjust the standards to account for the increase in measured energy. AHAM disagrees—

DOE's decision not to adjust the standards violates DOE's statutory obligations under 42 U.S.C. § 6295(gg)(2) and 42 U.S.C. § 6293(e). AHAM thus requests that DOE adjust the May 2013 standards to account for the impact of the standby and off mode amendments on measured energy or not require those amendments to determine compliance with the May 2013 standard.

A. DOE Concluded That The Standby And Off Mode Amendments Impact Measured Energy.

DOE determined that the amendments to the dishwasher test procedure regarding standby and off mode would impact measured energy and, thus, proposed that those amendments not be required until the compliance date of amended dishwasher standards that address standby mode and off mode energy use. *See* December 2010 SNOPR, at 75317; U.S. Department of Energy, Test Procedure for Dishwashers, Dehumidifiers, and Conventional Cooking Products, Notice of Proposed Rulemaking Public Meeting 71 (Dec. 17, 2010) [hereinafter Public Meeting Presentation] (stating that "inactive, off, and cycle finished modes measured under the proposed test procedure may result in energy consumption levels slightly higher than the current test procedure. The proposed amendments would clarify that provisions related to the new measures of energy consumption in standby mode and off mode would not be required to be used by manufacturers until the compliance date of any amended dishwasher standards addressing standby mode and off mode energy use") (emphasis added).

Throughout the rulemaking, it seemed that DOE would, appropriately, use the standards-setting process to account for the increase in measured energy due to the standby and off mode test procedure amendments. For example, DOE stated "that the standby mode and off mode energy use is of a magnitude that it would materially affect that standard-setting process without overwhelming the effects of differing levels of active mode energy use." *Id.* at 70 (emphasis added). And DOE further explained "that the magnitude of standby and off-mode energy use is such that integrating it would be measurable in changes in standby power, it would produce a measureable difference in

EAEU so, therefore, would factor into any standard setting process, but is not so great that it would overwhelm the effect of variations in active energy — active-mode energy use, how that would contribute to the EAEU.” Public Meeting, Energy Conservation Standard NOPR for Test Procedure for Dishwashers, Dehumidifiers and Conventional Cooking Products, Transcript 111-12 (Dec. 17, 2010) (emphasis added). DOE did not, however, expect the estimated annual energy use (EAEU) and estimated annual energy cost (EAOC) for dishwashers to be significantly affected by its proposed amendments to the test procedure. *See, e.g.*, Public Meeting Presentation, at 83.

In the September 2011 SNOPR, DOE continued to conclude that no amendments to the existing energy conservation standards would be required because the “proposed amendments would not measurably alter the existing energy efficiency and energy use metrics for residential dishwashers . . . [and because] those proposed amendments would clarify that manufacturers would not be required to use the provisions relating to standby mode and off mode energy use until the compliance of new energy conservation standards addressing such energy use.” September 2011 SNOPR, at 58355. AHAM commented that it did not agree with DOE’s conclusion that there would be no change in measured energy resulting from the standby and off mode test procedure changes:

AHAM does not agree, however, that there would be no change in measured energy resulting from the changes to the dishwasher test procedure. Although the dishwasher test procedure currently measures standby, the proposed amendments change what energy will be measured. For example, the end of cycle energy will now be measured, including cycle finished mode. DOE should amend the reporting requirements, and standards, to account for this change.

AHAM October 2011 Comments, at 3. Yet DOE did not change its position in the Test Procedure Final Rule. *See* Test Procedure Final Rule, at 65946-47.

#### B. AHAM Data Show That The Standby And Off Mode Amendments Impact Measured Energy.

Based on data AHAM collected, the standby and off mode amendments to the residential

dishwasher test procedure will add a shipment weighted average of 1.10 kWh per year. This amount could be enough, especially combined with the increase in measured energy due to the fan-only mode amendments, to require a manufacturer to re-certify and re-label some or all of its dishwasher models. In addition, the shipment weighted average number includes a wide range of impacts on manufacturers and individual models, some much greater than 1.10 kWh per year. AHAM thus encourages DOE to interview individual manufacturers about the impact based on different technologies.

### C. DOE Must Account For The Impact Of The Standby And Off Mode Amendments On Measured Energy.

DOE did not address the impact of the standby or off mode as measured per Appendix C1 in the Direct Final Rule. Nor could it have because DOE adopted Appendix C1 on October 31, 2012, over a month after the Direct Final Rule became effective. Furthermore, the Joint Stakeholder Agreement did not contemplate the standby and off mode amendments to the test procedure and the Joint Stakeholders made no agreement regarding the proper standards for standby and off mode energy consumption. *See* Joint Stakeholder Agreement, at ¶ 4. In fact, the Joint Stakeholder Agreement included proposed statutory language for implementing the agreement which expressly stated that “[a]ny final rule amending the dishwasher test procedure after July 9, 2010, and before January 1, 2013 shall also amend the standards contained in [the agreement] according to the procedures in section 323(e) [of the Energy Policy and Conservation Act]. Section 323(e)(3) shall not apply to these amended standards.” Joint Stakeholder Agreement, at 7 (emphasis added). It also stated, more generally, that the Joint Stakeholders “agree[d] that pending amendments to test procedures for the affected products should be completed by DOE, subject to input from all stakeholders and agree to recommend that DOE translate the standards contained in this agreement to equivalent levels specified under revised test procedures.” *Id.* at ¶ 5.

Thus, in order to require use of the amendments for compliance with the May 2013

standards, DOE must account for the increase in measured energy due to the standby and off mode amendments. DOE followed this approach in its implementation of the Joint Stakeholder Agreement's recommendations for clothes dryers, room air conditioners, and clothes washer standards. *See, e.g.,* Energy Conservation Program: Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners, Final Rule, 76 Fed. Reg. 22454, 22477 (Apr. 21, 2011). And DOE should have done the same thing with regard to dishwashers. Accordingly, we respectfully request that DOE either do the same analysis here as it did for those products, or delay the compliance date of the standby and off mode amendments until the compliance date of a future standard that addresses standby and off mode. AHAM's preference would be that DOE revise the standards with which compliance is required on May 30, 2013, to account for the impact on measured energy.

In the Test Procedure Final Rule, DOE concluded, based only on a lack of data to the contrary, that the incorporation by reference of AHAM DW-1-2010 would not impact measured energy. *See* Test Procedure Final Rule, at 65966. AHAM proposed that DOE should incorporate AHAM DW-1-2010 by reference in the dishwasher test procedure. AHAM also commented that to do so, "DOE would need to determine whether this change would result in changes to measured energy (resulting from a change in dishware, for example) . . ." AHAM June 2012 Comments, at 12-13; *see also* AHAM August 2012 Comments, at 8. AHAM also volunteered to work together with DOE to make that determination. *See* AHAM August 2012 Comments, at 8. DOE did seek data regarding the impact incorporating AHAM DW-1-2010 by reference would have on measured energy. AHAM indicated that it did not have data indicating what the effect on measured energy would be were DOE to incorporate AHAM DW-1-2010 by reference, and DOE did not receive data from other stakeholders in response to its request. *See* AHAM August 2012 Comments, at 8; Test Procedure Final Rule, at 65966.

In the Test Procedure Final Rule, DOE responded to the lack of data by identifying the

differences between AHAM DW-1-1992 and AHAM DW-1-2010 and stating that it had “not been presented with any data or information that would show that these differences would impact the results from the DOE dishwasher test procedure for specific dishwasher models. DOE also notes the uniform support from commenters to reference the most recent version of industry standards in its test procedures and observes that some test laboratories are already conducting dishwasher testing according to ANSI/AHAM DW-1-2010. Further, these amendments will not be required until the compliance date of new standards, which will be May 30, 2013. . . . If manufacturers determine that the new DOE test procedure does not measure energy and water use that is representative for their products, they may submit to DOE a petition for waiver from the DOE test procedure to determine an appropriate method.” Test Procedure Final Rule, at 65966.

AHAM fully supports incorporation of AHAM DW-1-2010 by reference in Appendix C1 and thanks DOE for incorporating by reference the most recent industry test procedure. Like DOE, AHAM does not believe that the differences between AHAM DW-1-1992 and AHAM DW-1-2010 would noticeably impact measured energy. Accordingly, we are not asking DOE to reconsider its decision to incorporate AHAM DW-1-2010 by reference. Nevertheless, DOE should ensure in future rulemakings that it fulfills its duty under the law to investigate the impact on measured energy and should not act on its own non-empirical belief about the impact of a test procedure change on measured energy. If DOE does not get the data it requests, it must gather the data itself, continue seeking it from sources likely to have it, or accept that there is no available data on the point and thus, no rational, empirically based action can be taken.

## **CONCLUSION**

DOE concluded during the rulemaking process that amendments to the residential dishwasher test procedure regarding fan-only mode and standby and off mode impact measured energy. And, as discussed above, AHAM’s data further quantifies that impact. Furthermore, the shipment weighted average of the impact of both the fan-only mode and standby and off mode amendments is 1.38 kWh

per year. That energy takes into account the market penetration of fan-only mode—it does not assume that all basic models have fan-only mode. Accordingly, we request that DOE either: 1) revise the May 2013 standards to account for the impact on measured energy using the data AHAM presented in this petition or through comprehensive testing that compares total measured energy under Appendix C versus Appendix C1; or 2) not require measurement of fan-only mode or the revised standby and off mode procedures until such time as a revised standard is promulgated for residential dishwashers.

AHAM believes that, overall, the amendments made to the test procedure, which reside in Appendix C1, are critical amendments, many of which will enhance the repeatability and reproducibility of the test procedure. And we thank DOE for making those amendments, many of which AHAM requested. Thus, AHAM's preference would be that DOE revise the standards with which compliance is required on May 30, 2013, to account for the impact on measured energy. AHAM would be glad to assist DOE in determining the appropriate amended energy conservation standard under 42 U.S.C. § 6293(e)(2). Pending resolution of the instant petition, AHAM requests that DOE stay compliance with the May 30, 2013, standards and Appendix C1.

Respectfully submitted,

**ASSOCIATION OF HOME APPLIANCE MANUFACTURERS**

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Dated: November 30, 2012

[FR Doc. 2012-31392 Filed 12/28/2012 at 8:45 am; Publication Date: 12/31/2012]